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No. 97-1137

In The

Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

Petitioners,

v.

MELTON NELSON; LANITA NELSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

A. This Case Has Enormous, Not Limited, Significance

Respondents argue that the opinion below is of limited significance because it turned on the particular language of the last page of the employee handbook and was not inconsistent with precedent of this Court or decisions of other federal courts of appeals.

By measuring the language on the last page of the handbook against federal law, the Ninth Circuit disregarded this Court's requirements that the validity of an arbitration agreement be decided under state law and that arbitration agreements be treated no differently than other contracts. See, e.g., *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924 (1995); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337 (1987). The Ninth Circuit did not apply federal law because of the particular language on the last page of the handbook. The significance of the opinion below is, therefore, not limited to the facts of this particular case.

Neither the Eighth Circuit, in *Patterson v. Tenet Health Care, Inc.*, 113 F. 3d 832 (8th Cir. 1997), nor the Fourth Circuit, in *O'Neil v. Hilton Head Hospital*, 115 F. 3d 272 (4th Cir. 1997), has adopted a "knowing" agreement requirement when enforcing employee handbook arbitration agreements. Respondents' citation of two other cases to support their argument that there is no conflict among the circuits only underscores the depth of that conflict. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F. 3d 1126 (7th Cir. 1997), expressly noted the split between the

Ninth and Eighth Circuits, declined to decide the "knowing" agreement issue, and ruled on the validity of the arbitration agreement under Indiana law. 121 F. 3d at 1129-30. *Ramirez-de-Arellano v. American Airlines*, 133 F. 3d 89 (1st Cir. 1997), was decided on grounds not pertinent here but favorably discussed the Ninth Circuit's opinion below. 133 F. 3d at 91, n.2. The First Circuit, therefore, is leaning with the Ninth, opposite the Eighth and Fourth, on this issue.

B. Arizona Law Does Not Diminish the Significance of This Case

In seeking to downplay the significance of this case, Respondents contend that a knowing agreement standard would have also applied under Arizona law, as embodied in *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P. 2d 1382 (App. 1996). This contention addresses whether the particular arbitration agreement here is enforceable and not the significance of Ninth Circuit precedent that requires that the validity of an arbitration agreement be determined under federal law.

The contention also misstates the holding in *Francini*. The question there was whether an employee should be required to exhaust his collective bargaining agreement remedies before bringing an employment discrimination suit. Noting the distinctions this Court has drawn between arbitration provisions in collective bargaining agreements and those found in other contracts, the Arizona court held only that the collective bargaining agreement before it did not require arbitration of the plaintiff's employment discrimination claim. 188 Ariz. at 584.

Respondents' reliance upon *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 840 P. 2d 1013 (1992), is also misplaced. An arbitration agreement in an abortion clinic admissions form was there denied enforcement because it was deemed beyond the "reasonable expectations" of the patient. The court's holding was carefully confined to the facts of the case and, as noted by the dissent, the Arizona "reasonable expectations" standard is not the same as a "knowing" agreement standard. 173 Ariz. at 153, 155.

C. Conclusion

This case is of enormous significance to arbitration agreements, generally, because of the Ninth Circuit's disregard of this Court's precedents and the split in the circuits below.

Respectfully submitted,

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